

No. 16-3076

No. 16-3570

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

NOVELIS CORPORATION, Petitioner – Cross-Respondent,

**JOHN TESORIERO, MICHAEL MALONE,
RICHARD FARRANDS, AND ANDREW DUSCHEN, Intervenors,**

v.

NATIONAL LABOR RELATIONS BOARD, Respondent – Cross-Petitioner,

**UNITED STEEL, PAPER AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE
WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, Intervenor.**

***ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF A DECISION OF THE NATIONAL LABOR
RELATIONS BOARD***

DEFERRED APPENDIX VOLUME IX (A-1761 – A-1764)

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<p style="text-align: right;">Page 263</p> <p>1 matter asserted.</p> <p>2 MS. ROBERTS: Are we -- Sheftic is a known supervisor.</p> <p>3 He's pled and admitted it in the Complaint.</p> <p>4 JUDGE ROSAS: Do you deny his supervisory status?</p> <p>5 MR. POWELL: No, we don't deny his supervisory status.</p> <p>6 But that doesn't mean that the hearsay rule doesn't apply. The</p> <p>7 only hearsay applies -- the only exception would be if it's an</p> <p>8 admission against interest.</p> <p>9 MS. ROBERTS: And that's what I would assert, that it</p> <p>10 would be --</p> <p>11 JUDGE ROSAS: Right, right.</p> <p>12 (Pause)</p> <p>13 JUDGE ROSAS: Okay, so 801, Federal Rules of Evidence,</p> <p>14 801(d)(2), "Admission by party opponent or representative</p> <p>15 thereof, the statement being offered by I guess party (a)",</p> <p>16 that means "A", "the party's own statement, and either an</p> <p>17 individual representative, capacity or (b), a statement of</p> <p>18 which the party has manifested and believe in its truth, or</p> <p>19 (c), a statement by a person authorized by a party to make a</p> <p>20 statement concerning the subject, or (d), a statement by the</p> <p>21 party's agent concerning a matter within the scope of the</p> <p>22 agency of the employment made during the existence of the</p> <p>23 relationship, or (e), a statement by a coconspirator", blah,</p> <p>24 blah, blah, that doesn't apply here.</p> <p>25 Okay. Now, if the essence of the objection is that the</p>	<p style="text-align: right;">Page 265</p> <p>1 allegedly by the representative party. Okay?</p> <p>2 MR. DOBKIN: Judge, may I be heard for a moment? Just to</p> <p>3 clarify a question in terms of understanding the distinction</p> <p>4 between Mr. Sheftic as the Company's representative and the</p> <p>5 Union's organizing committee members who were here earlier as</p> <p>6 representatives of the Charging Party --</p> <p>7 JUDGE ROSAS: Yes.</p> <p>8 MR. DOBKIN: -- any objections based on hearsay were</p> <p>9 sustained.</p> <p>10 JUDGE ROSAS: Yes.</p> <p>11 MR. DOBKIN: I'm just trying to understand the</p> <p>12 distinction.</p> <p>13 JUDGE ROSAS: Again, it's the same -- it's the exact same</p> <p>14 application, and that is the objection being sustained, not as</p> <p>15 to any statements by the Union representative, but as to other</p> <p>16 10(d)s people that he got the signature cards from, questions</p> <p>17 that they might have asked him, those particular people, not</p> <p>18 good.</p> <p>19 In this instance the people in the audience that asked</p> <p>20 questions that resulted in the Company making statements,</p> <p>21 nothing about those questions is in the record, just the fact</p> <p>22 that as a result of questions being asked, at least the</p> <p>23 following was stated. That's it, that's your classic</p> <p>24 admissibility of hearsay in those instances. Okay?</p> <p>25 DIRECT EXAMINATION (continued)</p>
<p style="text-align: right;">Page 264</p> <p>1 person is unauthorized to make the statements that's not where</p> <p>2 the case load is going, as far as the breathe of 801(d)(2). As</p> <p>3 long as the person has -- is in an appropriate capacity and is</p> <p>4 making a statement that is somehow within the realm of their</p> <p>5 duties and responsibilities it's generally okay. Okay?</p> <p>6 MS. ROBERTS: I'd like to note as well that Mr. Sheftic is</p> <p>7 listed as the human resource manager and that's admitted -- an</p> <p>8 admitted capacity by Respondent.</p> <p>9 JUDGE ROSAS: Okay. Is there anything else you want to</p> <p>10 put on the record?</p> <p>11 MR. POWELL: I'll just take exception to the ruling and --</p> <p>12 JUDGE ROSAS: Okay.</p> <p>13 MR. POWELL: -- we believe that Counsel for the General</p> <p>14 Counsel is soliciting hearsay testimony which should be</p> <p>15 excluded.</p> <p>16 MS. ROBERTS: And I would note that it's not -- I'm not</p> <p>17 asserting it as hearsay --</p> <p>18 JUDGE ROSAS: Yeah.</p> <p>19 MS. ROBERTS: -- because he's a party --</p> <p>20 JUDGE ROSAS: Yeah, I mean anything being any questions</p> <p>21 preceding, as we went through that same exercise with</p> <p>22 Respondent, would not be considered and would not be given any</p> <p>23 weight to the extent that any of this is assumed. These -- all</p> <p>24 that is in the record that is competent to be evaluated by me,</p> <p>25 as far as these hearsay standards, is -- what is stated</p>	<p style="text-align: right;">Page 266</p> <p>1 BY MS. ROBERTS:</p> <p>2 Q Mr. Abare --</p> <p>3 JUDGE ROSAS: I don't know if you got an answer to your</p> <p>4 question as to what the manager or supervisor said to the</p> <p>5 employees.</p> <p>6 BY MS. ROBERTS:</p> <p>7 Q Can you tell what Mr. Sheftic said?</p> <p>8 A Pete Sheftic, at that point, told the employee that we</p> <p>9 certain hope that we don't have to have the Union here at this</p> <p>10 point, that we will -- we're better off doing our own</p> <p>11 negotiating.</p> <p>12 MR. POWELL: I move to strike, it's not a part of the</p> <p>13 admission and this doesn't fit into any exception of the</p> <p>14 hearsay rule.</p> <p>15 MS. ROBERTS: I argue differently that Mr. Sheftic, who is</p> <p>16 the HR manager for Novellis conducting this wage and benefit</p> <p>17 meeting, responded to a direct question from employees, and his</p> <p>18 response --</p> <p>19 MR. POWELL: There's no evidence of the directed question.</p> <p>20 MS. ROBERTS: But his response is the evidence. As an</p> <p>21 exception to the hearsay rule the party opponent, Mr. Sheftic</p> <p>22 is a party --</p> <p>23 MR. POWELL: But there's no admission.</p> <p>24 MS. ROBERTS: His statement is the admission.</p> <p>25 MR. LARKIN: They claim it's an admission. You say it's</p>

4/4/14 Interview notes – Everett Abare Facebook posting discussion

Meeting with Everett Abare in Greg DuFore's office

Attendees: Andrew Quinn – HR Leader (writer), Greg DuFore – CM Manufacturing Unit Manager, Everett Abare

The meeting started with A. Quinn explaining to Everett that we had received some concerns from employees and, as always, we wanted to make sure that we gathered all of the information available to be fair to everyone. I presented the print out of Everett's Facebook post that created the concern. Everett immediately stated that it was him that posted the information on Facebook. I then explained to Everett that this type of behavior was extremely insulting to his peers. I also explained that it was very disappointing based on his positions of shop floor leadership. I specifically mentioned being a Crew Leader, Fire Dept. Shift Captain and a member of the EMS squad. Everett said that he understood and he was very upset with himself. He said that he knew shortly after posting it that he had made a mistake. Everett expressed that soon after posting it a friend contacted him and told him he was highly offended by his post. Everett said that this is a friend he has a lot of respect for and that he realized then that what he did was very wrong. Everett expressed that he was very frustrated with his paycheck and expressed it the wrong way. Everett also said that his wife came in and said to him, "really Ev", F" (referring to the F word in the posting). Everett said that his wife is a Manager at her work and she expressed serious displeasure with him and explained that it could affect him at work. I then explained to Everett that his actions were in violation of the company policies and procedures and was not what we expected in treating his coworkers with the proper respect and dignity. Everett said many times that he was willing to apologize to anyone that he offended. He offered to send out a Facebook post to everyone apologizing for his actions. He also said multiple times that he wishes he could go back and hit delete on the keyboard that night. Everett repeatedly expressed that he was embarrassed and was willing to apologize to anyone to make it better. Everett also expressed multiple times that "this is not me", I was just frustrated. I continued by expressing the company having concerns over Everett being an EMT when he has demonstrated his inability to manage his feelings and emotions towards half of the workforce that do not see things the same way he does. Everett said he understood and that he didn't really know what else to say other than what he had already said.

I closed the conversation by telling Everett that we would be sitting down with Chris Smith and Pete Sheftic when they returned from their trip to Atlanta. The purpose of this meeting would be to determine the next steps. Everett said, "what do you mean by that"? I expressed to Everett that we took this very seriously and we needed to determine what level of action needed to be taken. I expressed to Everett that I did not expect it to rise to the level of termination but we needed to discuss it further with his added information. I advised Everett that he should also think about what he could do to help rectify the situation and that we would contact him next week to inform him of the next steps. Everett said he understood and said he was sorry for getting to this point.

Andrew Quinn

Respondent's Exhibit 159

A-1762

<p style="text-align: right;">Page 2511</p> <p>1 into Oswego was not a black and white decision. 2 He believes nobody was scared to express their support for 3 the Union, based on his observations during the time of the 4 organizing campaign. And his observation was that pro-union 5 employees were open, during the campaign, about their feelings. 6 He never felt threatened by the company at any time, during the 7 organizing campaign. 8 He does not believe there is any reason he or others 9 couldn't vote their true feelings in another NLRB election. 10 And he has observed coworkers who remain openly supportive 11 toward the Union since the election. He has heard employees on 12 the company's PA system expressing union support. He finds it 13 irritating, but he has heard those remarks. Believe that's 14 everything. 15 MS. ROBERTS: We would object to that. 16 MR. MANZOLILLO: We would object -- 17 JUDGE ROSAS: Objection sustained. Next witness. 18 (Whereupon, a brief recess was taken) 19 JUDGE ROSAS: On the record. 20 MR. POWELL: The company calls Robert Esweting. 21 JUDGE ROSAS: Sir, please raise your right hand. 22 Whereupon, 23 ROBERT ESWETING, JR. 24 Having been first duly sworn, was called as a witness and 25 testified herein as follows:</p>	<p style="text-align: right;">Page 2513</p> <p>1 interview or meet with the company's attorneys? 2 A Yes. 3 Q If you will look on the table in front of you, I think it 4 should be this side of the table, there's an exhibit that has 5 been marked Respondent's exhibit 293. Do you see that 6 document? 7 A Yes. 8 Q And have you seen that document before? 9 A Yes, I have. 10 Q Were you provided with that written statement of your 11 rights when you met with the company's attorneys? 12 A Yes, I was. 13 Q And were you provided with the opportunity to choose or 14 not choose to participate in a meeting with the company's 15 attorneys, after having read that statement of your rights? 16 A Yes. 17 Q And each time did you elect to speak with the company's 18 attorneys, after reading that statement of your rights? 19 A Yes, I did. 20 Q Where are you employed? 21 A Novelis Oswego. 22 Q And how long have you been employed at Novelis? 23 A Almost two years. 24 Q What department are you employed in? 25 A Engineering maintenance.</p>
<p style="text-align: right;">Page 2512</p> <p>1 JUDGE ROSAS: Alright. Please state and spell your name 2 and provide your address. 3 THE WITNESS: Robert Esweting, Junior, R-O-B-E-R-T E-S-W- 4 E-T-I-N-G, J-R. 5 JUDGE ROSAS: Your address? 6 THE WITNESS: P.O. Box 146, Sterling, New York, 13156. 7 JUDGE ROSAS: You -- your business address is, I assume, 8 Novelis? 9 THE WITNESS: Yes. 10 JUDGE ROSAS: Okay. 11 DIRECT EXAMINATION 12 BY MR. POWELL: 13 Q Mr. Esweting, are you here pursuant to a subpoena? 14 A Excuse me? 15 Q Are you here pursuant to a subpoena? 16 A Yes. 17 Q Prior to testifying here today had you met with the 18 company's attorneys? 19 A Yes. 20 Q When you met with the company's attorneys were you told 21 that it was up to you whether or not you wanted to meet with 22 them? 23 A Yes. 24 Q Were you provided with a written statement of your rights 25 about whether to choose to participate or not participate in an</p>	<p style="text-align: right;">Page 2514</p> <p>1 Q What position do you hold? 2 A Mechanic. 3 Q And what shift are you on? 4 A Straight days. 5 Q Who's your crew leader? 6 A We have four of them; Tom Wells, Rodney Buskey, Bill 7 Barton and Michael Jordan. 8 Q I had to do the Michael Jordan comment, sorry. I assume 9 it's not Michael Jordan the former basketball player? 10 A No, sir. 11 Q Were those your crew leaders also, during the time of the 12 union campaign in January and February 2014? 13 A Only two of them. Two of them started after. 14 Q Who were the two crew leaders during that time period of 15 January and February 2014? 16 A Rodney Buskey and Tom Wells. 17 Q During that same time period, January and February 2014, 18 who was your associate leader? 19 A I believe it's Cliff Pelton. 20 Q And during that same time period, who did Mr. Pelton 21 report to? 22 A I believe it's Ernie Tresodi (sic). 23 Q Ernie Tresidder? 24 A Tressider, yes. 25 Q During the -- prior to coming to work at the Novelis</p>

<p style="text-align: right;">Page 2874</p> <p>1 Q Okay. What other addition exists presently that is not 2 shown on this diagram, Respondent's Exhibit 1? 3 A The current -- the picture that's on this document shows 4 two CASH Lines. If we were to stretch the -- what I would 5 consider the North end, where it says CASH, 110; you'd have to 6 basically add another line above that. So half the box 7 stretched out to the North end to accommodate for the third 8 line which is going in. 9 MR. POWELL: I move for admission of Respondent's 10 Exhibit 1. 11 MS. LESLIE: General Counsel has no objection, Your 12 Honor. 13 MR. MANZOLILLO: No objection. 14 JUDGE ROSAS: Respondent's Exhibit 1 is received. 15 (Respondent's Exhibit 1 received.) 16 BY MR. POWELL: 17 Q Mr. Quinn, how many hourly production and maintenance 18 employees are currently employed at the Oswego Works? 19 A Approximately 650. 20 Q And approximately how many hourly production and 21 maintenance employees worked at the Plant in January and 22 February of this year? 23 A Approximately 600. 24 Q And why did that number increase? 25 A We've been adding continually to the workforce.</p>	<p style="text-align: right;">Page 2876</p> <p>1 would have testified that the Company was hiring approximately 2 150 to 200 new employees per year in the two-year period 3 leading up to the election. 4 JUDGE ROSAS: And therefore, employees that were voting 5 in the election had reason to believe that there would continue 6 to be this excessive hiring of employees every year; so we're 7 not going to close the plant, because we have to hire 150 every 8 year? 9 MR. POWELL: There is continued growth and expansion of 10 the Plant. 11 JUDGE ROSAS: Okay. Next question. 12 BY MR. POWELL: 13 Q Does the Company also have plans to hire additional 14 employees in the near future? 15 MS. ROBERTS: Objection; relevance. 16 MR. POWELL: This goes to changed circumstances in terms 17 of the appropriateness of a Bargaining Order as requested by 18 Counsel for General Counsel in this case; and the fact that 19 there are going to be -- and there already have been hired -- 20 new employees and that there are going to be additional new 21 employees who will not have had an opportunity to express their 22 voice with respect to the question of unionization. 23 JUDGE ROSAS: As of today, it's -- testimony is set at 24 650; is that right? 25 MR. POWELL: That is correct.</p>
<p style="text-align: right;">Page 2875</p> <p>1 Q Have you been involved in the hiring process at the 2 Oswego Plant for some period of time? 3 A Yes, sir. 4 Q How long have you been involved in that process? 5 A On and off for the last nine years -- nine-and-a-half 6 years that I've worked there. 7 Q And approximately how many employees per year has the 8 Company been hiring over the past three years? 9 MS. ROBERTS: Objection; relevance. 10 JUDGE ROSAS: You've got the current workforce. You've 11 got the workforce in January. What does this go to, future 12 hiring? 13 MR. POWELL: No, Your Honor. I don't know if you want 14 me to say it in front of the witness, Your Honor. 15 JUDGE ROSAS: It doesn't matter. 16 MR. POWELL: It goes to the -- again objected context in 17 which was leading up to the statements made in the campaign 18 that the Company's continuously been hiring. In the years 19 leading up to the campaign, it shows on-going and continued 20 growth of the Company. 21 JUDGE ROSAS: I'm going to sustain the objection. 22 MR. POWELL: I would like to proffer that testimony, 23 then. 24 JUDGE ROSAS: Sure. 25 MR. POWELL: If Mr. Quinn, if permitted to testify,</p>	<p style="text-align: right;">Page 2877</p> <p>1 JUDGE ROSAS: And that's where we are. Sustained. 2 MR. POWELL: Then I would like to proffer that 3 testimony. 4 If permitted to testify, Mr. Quinn would have testified 5 that the Company does have plans to hire additional hourly 6 employees and that the planned number of employees to be hired 7 over the next couple of years is approximately 250 to 300 8 employees; and that over half of those jobs would be production 9 and maintenance jobs; and that that number of hires does not 10 include hiring to replace people who quit, retire, or otherwise 11 leave the Company in that time period. 12 BY MR. POWELL: 13 Q Mr. Quinn, has the Company announced its intention to 14 hire additional employees -- 15 MS. ROBERTS: Objection. 16 JUDGE ROSAS: Let him finish the question and just give 17 it a second, Mr. Quinn. 18 BY MR. POWELL: 19 Q Mr. Quinn, has the Company communicated to employees its 20 intention to hire additional employees to staff the CASH Lines 21 and the expansion at the Oswego Plant? 22 JUDGE ROSAS: And then there's an objection. 23 Let's get an answer to that followed up by a specific 24 timeframe. 25 THE WITNESS: Yes.</p>

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) and has been prepared using Microsoft Office Word 2010 in proportionally spaced, 14-point Times New Roman.

/s/ Kurt A. Powell

Kurt A. Powell

Counsel for Novelis Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Second Circuit Court of Appeals NextGen CM/ECF filing system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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This 18th day of May, 2017.

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